

ESTATE OF JOSEPH POOLAW

IBIA 90-4

Decided July 9, 1990

Appeal from an order denying rehearing issued by Administrative Law Judge Sam E. Taylor in Indian Probate IP OK 65 P 87.

Affirmed.

1. Indian Probate: Wills: Testamentary Capacity: Generally

An Indian testator may be deemed competent to make a will even though he is unable to manage his own business affairs, has had a guardian appointed for him, is illiterate, and/or is unable to speak or understand the English language.

2. Indian Probate: Wills: Testamentary Capacity: Generally

To invalidate an Indian will for lack of testamentary capacity, the evidence must show that the decedent did not know the natural objects of his bounty, the extent of his property, or the desired distribution of that property. Further, the evidence must show that this condition existed at the time of execution of the will.

3. Indian Probate: Wills: Undue Influence

To invalidate an Indian will on the grounds of undue influence, it must be shown that (1) the decedent was susceptible of being dominated by another; (2) the person allegedly influencing the decedent in the execution of the will was capable of controlling his mind and actions; (3) such a person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) the will is contrary to the decedent's own desires.

APPEARANCES: Arvo Q. Mikkanen, Esq., and Lynn O. Holloman, Esq., Oklahoma City, Oklahoma, for appellants; Thomas R. Zynda, Esq., Anadarko, Oklahoma, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Archie Poolaw; Ileana Poolaw, a.k.a. Aileen Poolaw; Charlotte Poolaw Franke; Catherine Poolaw Wapp; and Albert Poolaw seek review of an August 11, 1989, order denying rehearing issued by Administrative Law Judge Sam E. Taylor in the estate of Joseph Poolaw (decendent). For the reasons discussed below, the Board affirms that decision.

Background

Decendent, Kiowa allottee No. 593, was born on March 18, 1900, and died testate on June 24, 1986, at Lawton, Oklahoma. He executed a will on September 24, 1980, in which he devised a life estate in his own allotment to his daughter Helen Poolaw Hatfield, appellee here, with the remainder in equal shares to Helen's son, Joseph Hatfield, and appellant Ileana Poolaw. He devised a 0.13-acre portion of another allotment to Helen and a 2.5-acre portion of the same allotment to Joseph, with a life estate in Helen. He devised the residue of his estate equally to his seven children. ^{1/}

Judge Taylor held hearings to probate decendent's trust estate on June 3, 1987, and July 19, 1988, at Anadarko, Oklahoma. Archie Poolaw and Charlotte Poolaw Franke objected to the approval of decendent's will on the grounds that decendent lacked testamentary capacity and was subjected to undue influence in the execution of his will. Both appellants and appellee were represented by counsel. Testimony was taken from Archie Poolaw; Ileana Poolaw; Helen Poolaw Hatfield; Joseph Hatfield; Robert Benjamin Hatfield, another son of Helen; Amelia Bates, sister of decendent's deceased wife; Ivan Ray Crandall, widower of Shirley Poolaw Crandall; Ella Mae Morton, the will scrivener; Ellis M. Wolf, the interpreter who assisted at the will execution; James F. Oswald, a lessee of decendent's land; and Lupe Goodeau, a realty specialist at the Anadarko Agency, Bureau of Indian Affairs.

On March 31, 1989, Judge Taylor approved decendent's will, stating, inter alia:

The interpreter and scrivener of said will testified that the will was duly and properly made and executed and that in their opinion the decendent had the requisite testamentary capacity.

The protestants to said will introduced testimony that prior to the death of decendent's wife in 1971, she conducted the family business and that decendent was illiterate and could not count. They further showed that a conservator was appointed for the decendent after he made his will in 1980, but neither of the co-conservators ever acted as such or took charge of decendent's business.

^{1/} These are the five appellants; appellee Helen Poolaw Hatfield; and Shirley Poolaw Crandall, now deceased.

Testimony was presented that decedent conducted his own business, negotiated his own leases, and paid his own bills after his wife died in 1971 until his death. There was no dispute that he knew his children and the nature of his estate. Further, there was no evidence that the decedent was ever subject to anyone's influence.

(Order Approving Will at 1-2).

Archie Poolaw filed a petition for rehearing on the grounds that newly discovered evidence showed decedent had been adjudicated an incompetent person in 1925. Also included with the petition was an affidavit from Ileana Poolaw, concerning statements made by Helen Hatfield in July 1971, which were claimed to show undue influence; and other affidavits from appellants.

Judge Taylor denied the petition on August 11, 1989, stating in part:

The record of the 1925 guardianship proceedings was purportedly disclosed to petitioner after the Order Approving Will and Decree of Distribution, by Amelia T. Bates, a sister-in-law of the decedent. The record herein shows that Amelia T. Bates was present and testified at the hearing herein on July 19, 1988. Further, it appears that the 1925 guardianship proceedings were subsequently dismissed by the guardian and petitioner thereof.

In addition to a copy of the 1925 guardianship proceedings, petitioner has attached to his petition six (6) affidavits. Four (4) of the persons submitting affidavits were present at the hearing herein on July 19, 1988, at which time three (3) of them testified. A review of all the affidavits discloses that they do not set forth any new evidence.

(Order Denying Rehearing at 1).

Appellants' notice of appeal from this order was received by the Board on October 10, 1989. Both appellants and appellee filed briefs.

Discussion and Conclusions

Appellants argue that Judge Taylor erred in failing to order a rehearing for the purpose of considering their new evidence concerning a 1925 adjudication of incompetency. This evidence, appellants assert, together with other evidence presented at decedent's probate hearing, shows that decedent lacked the capacity to make a will throughout his lifetime because of his deficient mental state. They also contend that Judge Taylor incorrectly found the 1925 proceedings had been dismissed. Further, they argue that the Judge erred in holding that decedent had not been subject to undue influence.

Appellants' evidence concerning the 1925 proceeding shows that, with the concurrence of decedent's mother, an individual unrelated to decedent was appointed guardian of his estate and person by order of the Caddo County District Court on March 5, 1925; that decedent and his wife appealed the appointment on March 6, 1925; and that the guardian voluntarily dismissed his petition on July 25, 1925, stating that "he has never received anything as guardian and he has been reimbursed for his expenses expended." Appellants argue, *inter alia*, that the dismissal had no effect on the court's ruling that decedent was incompetent, because the ruling was never reversed or vacated.

Other evidence relied upon by appellants to show decedent's lack of testamentary capacity includes: (1) a 1955 affidavit of a Solicitor's Office attorney who served as scrivener for a will executed by decedent in that year; ^{2/} (2) the appointment of Archie Poolaw and Helen Hatfield as conservators for decedent on October 6, 1981, upon a finding that decedent was "an illiterate and infirm person of advanced age"; and (3) the testimony of various individuals that decedent was illiterate, could not count, could not speak English well, and needed assistance in managing his affairs.

[1] In Estate of William Cecil Robedeaux, 1 IBIA 106, 123-24, 78 I.D. 234, 243 (1971), the Board stated:

The fact that the decedent was unable to manage his own business affairs does not preclude a finding that he possessed testamentary capacity at the time of execution of his will. * * * While an adjudication of a testator's mental incompetency to manage his property is to be considered in the determination of his testamentary capacity, such evidence is not conclusive proof thereof. * * * A person is not deemed to be incompetent to make a will by virtue of the fact that a guardian has been appointed. * * * A person may require a guardian to supervise his estate and yet be competent to make a valid will disposing of it upon his death. [Citations omitted.]

See also Estate of Charlotte Davis Kanine, 72 I.D. 58 (1965). ^{3/} Further, an Indian testator may be deemed competent to execute a will even though he

^{2/} The affidavit states:

"[I]t appeared to affiant that said Joseph Poolaw was of doubtful capacity to make a valid will; that affiant bases this belief upon the fact that said Joseph Poolaw was not responsive in all instances to questions propounded to him, that he was not certain as to the property he owned and that he had difficulty in recalling the names of his children; that during the course of the interview between affiant and said Joseph Poolaw prior to the drafting of said will, said Joseph Poolaw changed his mind as to the manner in which he desired his property to pass under the terms of his will."

^{3/} In that case, it was stated:

"[T]estamentary capacity and contractual or business capacity are so different in their nature that it is impossible to use one as a test for

is illiterate or unable to speak or understand English. Estate of Fannie Newrobe Choate, 7 IBIA 171 (1979); Estate of Taf-poie (Tof-pie), IA-1413 (May 9, 1966).

The testimony of various witnesses in this matter establishes that decedent had difficulty in managing his business affairs, that he relied on his wife to do this for him until her death in 1971, and that he relied to some extent on his daughter Helen following his wife's death. The testimony of other witnesses, however, indicates that, after his wife's death, decedent was actively involved in the management of his affairs, even though he needed assistance.

Decedent's lessee and a BIA realty specialist testified that, during the period in and around 1980, decedent made his own decisions concerning the leasing of his property, participated in lease negotiations, and conducted much of his own business. Their testimony also indicates that decedent understood the nature and extent of his property.

The interpreter who was present when decedent's will was drafted testified that decedent knew who his children were, was able to identify his property, and appeared to have already decided how he wanted to dispose of it. He specifically testified, after being informed of the 1955 affidavit of the Solicitor's Office attorney, expressing doubt as to decedent's testamentary capacity at that time, that this did not change his mind as to decedent's capacity on September 24, 1980 (Tr. 18).

Even taking appellants' proffered new evidence concerning the 1925 competency proceedings into account, ^{4/} the Board concludes that appellants have not produced evidence sufficient to rebut the testimony of the several disinterested witnesses whose testimony indicates that decedent was capable of executing a will on September 24, 1980. Appellants have not shown that decedent was under a guardianship at any time between 1925 and 1980. Further, although conservators were appointed for him a year after he executed his will, the record shows that he continued to conduct his own business even after the appointment. The 1955 affidavit of the Solicitor's Office attorney is not persuasive evidence of decedent's testamentary capacity in 1980, particularly in view of the direct testimony concerning decedent's capacity in and around 1980.

fn. 3 (continued)

measuring the other, or to say that the existence of one either proves or disproves the other's existence conclusively * * *. Thus, it has been held that the ability to transact business is not the true or legal standard of testamentary capacity, since a decedent may have possessed testamentary capacity, although unable to transact business."

72 I.D. at 62 (footnotes omitted).

^{4/} For purposes of this decision, the Board assumes without deciding that appellants could not have, with diligent effort, discovered this evidence prior to the original hearing. See, e.g., Estate of Joseph Kicking Woman, 15 IBIA 83 (1987).

[2] To invalidate an Indian will for lack of testamentary capacity, it must be shown that the decedent did not know the natural objects of his bounty, the extent of his property, or the desired distribution of that property. Further, it must be shown that this condition existed at the time of execution of the will. E.g., Estate of Comer Fast Eagle, 16 IBIA 40 (1988); Estate of Virginia Enno Poitra, 16 IBIA 32 (1988), and cases cited therein. Further, the burden of proof to make such a showing is on those contesting the will. E.g., Estate of Poitra; Estate of Fannie Pandoah Fisher Silver, 16 IBIA 26 (1988). Appellants have not shown that decedent lacked testamentary capacity when he executed his will.

Appellants have also failed to show that decedent was subjected to undue influence in the execution of his will. Appellants' new evidence on this point is an affidavit from Ileana Poolaw stating that, in July 1971, Helen Hatfield asked her to accompany Helen and decedent to make a new will and told her how she wanted decedent to make his will. The Board finds that a conversation which took place in 1971 is unpersuasive evidence that Helen exerted undue influence upon decedent in 1980. The other evidence relied on by appellants to show undue influence, consisting primarily of testimony that decedent required assistance with his affairs and that Helen lived with him and provided him with such assistance, is also unpersuasive.

[3] In order to invalidate an Indian will on the grounds of undue influence, it must be shown that (1) the decedent was susceptible of being dominated by another; (2) the person allegedly influencing the decedent in the execution of the will was capable of controlling his mind and actions; (3) such a person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) the will is contrary to the decedent's own desires. The burden of proof to show that undue influence was exercised is on those contesting the will. E.g., Estate of Leon Levi Harney, 16 IBIA 18 (1987). Appellants have not made such a showing.

Appellants contend, however, that decedent was in a confidential relationship with Helen so that, under the Board's cases, e.g., Estate of Jessie Pawnee, 15 IBIA 64 (1986), a presumption of undue influence arises, shifting the burden to Helen to rebut the presumption. Questions concerning confidential relationships arise most often where a will proponent has had control over the decedent's finances, such as under a power of attorney or a guardianship. See Estate of Poitra, 16 IBIA at 37. Helen gave decedent considerable assistance with his finances. However, she did not have a power of attorney for him and was not appointed conservator for him until a year after decedent executed his will; even then, she was appointed co-conservator with Archie Poolaw. Further, the record shows that decedent's lessee made monthly lease payments directly to decedent (Tr. 62, 68). It is clear, therefore, that decedent exercised some control over his own financial affairs. The Board finds that Helen and decedent were not in a confidential relationship such as would give rise to a shift in the burden of proof here.

The Board holds that appellants have not shown that decedent lacked testamentary capacity when he executed his will or that he was subject to undue influence.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1. Judge Taylor's August 11, 1989, order denying rehearing is affirmed.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge